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STATUTE

Section 237 (*a*) of the U. S. Judicial Code as amended by the Acts of February 13th, 1925, January 31st, 1928, and April 26th, 1928; Title 28 U. S. C., Sections 344 (*a*), 861 (*b*) 2
Remington's Compiled Statutes of Washington 1922, Vol. I., Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 826; Section 1741, page 926 4
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5 McQuillan on Municipal Corporations, Section 2018, 1913 Edition 24

1 Page and Jones on Taxation by Assessment, Section 118, page 197, 1909 Edition 24

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

vs.

RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, Appellant submits this statement showing that the

appeal in the above entitled cause is properly before this Court.

OPINIONS BELOW.

The opinion of the trial court, in a letter addressed to Counsel, unpublished, appears in the record on file in the Supreme Court of the State of Washington. (R. 32.) The opinion of the Supreme Court of the State of Washington, reported at this time in the Advance Sheets, Washington Decisions, Vol. 69, No. 3, published at Olympia, Washington, on August 17, 1932, at Page 108, and in 13 Pac. (2d) 437, was filed on the 8th day of August, 1932. (R. 42.) Petition for rehearing was filed by Appellant on the 30th day of August, 1932. (R. 48.) Petition for rehearing was denied on the 28th day of September, 1932. (R. 66.) Judgment was entered on the 28th day of September, 1932. (R. 67.) Remittitur was issued on the 28th day of September, 1932. (R. 67.)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the U. S. Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928; Title 28 U. S. C., Sections 344 (a), 861 (a) and 861 (b).

(1)

Appeal Timely Taken.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered on the 28th day of September, 1932. (R. 67.) A petition

for appeal, accompanied by Assignments of Error and Statement as to Jurisdiction required by Rule 12 (1) of the Supreme Court of the United States, was on the 15th day of October, 1932, presented to the Honorable Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington, (R. 68.) and by him allowed on the 15th day of October, 1932. (R. 77.)

(2)

Finality of Judgment.

The judgment forming the basis of the appeal is a final judgment in the sense that an affirmance of it would leave nothing to be done by the Court below but to execute the judgment already rendered.

It is one dismissing Plaintiff Appellant's Complaint and awarding costs against him. It was entered after the Court had sustained demurrers of all adverse parties to the Complaint and after the Plaintiff Appellant had elected to stand upon his Complaint and refused to plead further. On its face it is final in form as well as in substance, and disposes of all elements of controversy.

Mower v. *Fletcher*, 114 U. S. 127;

Board of Commissioners of Tippecanoe County, v. *Lucas, Treasurer*, 93 U. S. 108, 113, 114;

Wecker v. *National Enameling and Stamping Company*, 204 U. S. 176, 182.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of the State Washington is that of the highest Court in which,

under the laws of the State, such judgment could be had. No further appeal may be had to it or any other Court, save the Supreme Court of the United States, hence the appeal herein is taken from "a highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV., Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume 1, pages 75, 77 and 79 respectively.

Remington's Compiled Statutes of Washington, 1922, Vol. I, Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 926; and Section 1741, page 926.

Certificate of the Chief Justice of the Supreme Court of the State of Washington, re Finality of Judgment. (R. 85.)

(4)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this suit Appellant contended in the Court below that a State statute, as applied, was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the decision of he court below was in favor of the validity of the State statute.

(*a*) *The Statute.*

The statute, the validity of which was drawn into question, is the Irrigation District Law of the State

of Washington embodied in Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington, 1922, Volume II, Title XLVIII, Chapter IV, as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington, 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive, pertinent provisions of which are summarized as follows:

Section 7417 of Remington's Compiled Statutes of Washington, 1922, page 1710, as amended by Section 7417, page 973, of Remington's Compiled Statutes of Washington, 1927 Supplement, provides that whenever a majority of the holders of title to lands susceptible of "irrigation" desire to provide construction of works for the irrigation of the same, they may propose the organization of an irrigation district, and when so organized such district shall have the powers conferred by law.

Sections 7417-1 and 7417-2, pages 973 and 974, Remington's Compiled Statutes of Washington, 1927 Supplement, set forth the purposes and powers of such an irrigation district, to-wit:

> (*a*) The construction or purchase of works, or parts of same, for the irrigation of lands within the operation of the district.

(*b*) The reconstruction, repair or improvement of existing irrigation works.

(*c*) The operation or maintenance of existing irrigation works.

(*d*) The construction, reconstruction, repair or maintenance of a system of diverting conduits from a natural source of water supply to the point of individual distribution for irrigation purposes.

(*e*) The execution and performance of any contract authorized by law with any department of the Federal Government or of the State of Washington, for reclamation and irrigation purposes.

(*f*) The performance of all things necessary to enable the district to exercise the powers herein granted.

(*g*) To purchase, and sell electric power to the inhabitants of the irrigation district for the purposes of irrigation and domestic use.

(*h*) To construct, repair, purchase, maintain or lease a system for the sale or lease of water to the owners of irrigated lands within the district for domestic purposes.

(*i*) To construct, repair, operate and maintain a system of drains, as herein provided.

(*j*) To assume, as principal or guarantor, any indebtedness to the United States under the Federal reclamation laws, on account of district lands.

Sections 7418 and 7419, pages 1710 to 1714, inclusive, of Remington's Compiled Statutes of Washington,

1922, as amended by Sections 7418 and 7419, pages 974 to 977, inclusive, of Remington's Compiled Statutes of the State of Washington, 1927 Supplement, and Sections 7420 to 7427, inclusive, pages 1714 to 1719, inclusive, Remington's Compiled Statutes of Washington, 1922, prescribe the steps to be taken to form an irrigation district, including the election of a board of directors.

Section 7428, page 1719, Section 7429, page 1720, Section 7430, page 1722, and Section 7431, page 1723, of Remington's Compiled Statutes of Washington, 1922, and Sections 7428-1, 7428-2, 7428-3, page 978, and Section 7429-1, page 979, and Sections 7431 1/2, 7431 1/2-1, 7431 1/2-2, 7431 1/2-3, 7431 1/2-4, 7431 1/2-5, 7431 1/2-6, pages 979 and 980, of Remington's Compiled Statutes of Washington, 1927 Supplement, describe and set forth the powers and duties of said board of directors.

Section 7433, page 1726, Section 7434, page 1726, and Section 7435, page 1727, of Remington's Compiled Statutes of Washington, 1922, and Section 7432, page 1723, of Remington's Compiled Statutes of Washington, 1922, as amended by Section 7432, page 981, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7432-1 to 7432-14, inclusive, pages 984 to 987, inclusive, and Sections 7434-1 to 7434-7, inclusive, pages 988 and 989, of Remington's Compiled Statutes of Washington, 1927 Supplement, authorize the districts to issue and sell bonds for the purposes therein mentioned, and prescribe the necessary steps therefor, the necessary investigations prior

to the sale of said bonds, and the conditions and terms of said bonds.

Section 7434, page 1726, of Remington's Compiled Statutes of Washington, 1922, provides:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section also provides for a lien upon the property of a district in favor of said bonds and gives a right of foreclosure thereof.

Section 7436, pages 1727 and 1728, Remington's Compiled Statutes of Washington, 1922, provides as follows:

> "Assessments made in order to carry out the purpose of this act shall be made in proportion to the benefits accruing to the lands assessed and equitable credit shall be given to the lands having a partial or full water right. * * * The secretary must, between the first Monday in March and the first Tuesday in September in each year * * * prepare an assessment-roll with appropriate headings in which must be listed all the lands within the district. In such book must be specified, in separate columns, under the appropriate headings:
>
> "First, the name of the person to whom the property is assessed. * * *
>
> "Second, land by township, * * * giving an estimate of the number of acres. * * *

> "Third, in further columns with appropriate headings shall be specified the ratio of benefits, or, when deemed by the secretary more practicable, the per acre value, or the amount of benefits, for general and special district and local improvement district purposes, and the total amount assessed against each tract of land."

Section 7438, pages 1728-1729, Remington's Compiled Statutes of Washington, 1922, provides that before the first Tuesday in November in each year the secretary must complete his assessment-roll and deliver it to the board, which shall give notice thereof, and of the time the board, acting as a board of equalization, will meet to equalize assessments.

Section 7439, page 1729, Remington's Compiled Statutes of Washington, 1922, requires the Board "to hear and determine such objections to the said assessment-roll as may come before them; and the board may change the same as may be just."

Chapter 185, Section 1, pages 478 to 482, inclusive, of the Session Laws of 1929 of the State of Washington, which amends Section 7440, page 990, of Remington's Compiled Statutes of Washington, 1927 Supplement, which amends Section 7440, page 1729, of Remington's Compiled Statutes of Washington, 1922, provides that:

> "The board of directors shall in each year * * * levy an assessment sufficient to raise the ensuing annual interest on the outstanding bonds, * * *"

and

"Beginning in the year preceding the maturity of the first series of the bonds of any issue, the board must from year to year increase said assessment for the ensuing years in an amount sufficient to pay and discharge the outstanding bonds as they mature. * * * *The board shall also at the time of making the annual levy, estimate the amount of all probable delinquencies on said levy and shall thereupon levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year.* * * *

"If the annual assessment roll of any district has not been delivered to the county treasurer * * * or if said roll when delivered is not equalized and the required assessments levied as required by law, or if for any reason the required assessment or levy has not been made, the county treasurer shall immediately notify the board of county commissioners of the county in which the office of the board of directors is situated, and said board of county commissioners shall cause an assessment roll for the said district to be prepared and shall equalize the same if necessary and make the levy required by this chapter in the same manner and with like effect as if the same had been equalized and made by the said board of directors, and all expenses incident thereto shall be borne by the district. * * *

"At the time of making the annual levy in the year preceding the final maturity of any issue of district bonds, the board of directors shall levy a sufficient amount to pay and redeem

all bonds of said issue then remaining unpaid. * * *." (Italics ours.)

Section 7441, pages 1730 and 1731, Remington's Compiled Statutes of Washington, 1922, provides that the assessment upon real property shall be a lien against the property assessed.

Section 7442, pages 1731 and 1732, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Section 1, pages 469 to 472, inclusive, and Sections 7442-1 and 7442-2, pages 992 and 993, Remington's Compiled Statutes of Washington, 1927 Supplement, provide for the collection of the assessment.

Sections 7443 to 7445, inclusive, pages 1732 to 1735, inclusive, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Sections 2 and 3, pages 472 to 474, inclusive, provide for the sale of property for delinquent assessments, including a provision that if there is no purchaser in good faith when the property is offered for sale a second time, the whole amount of the property assessed shall be struck off to the irrigation district as the purchaser, and the district is thereupon endowed with the same rights in said property as a private purchaser, and may, if said property is not redeemed, sell it at its *reasonable market value.*

The remaining sections of the statute, not heretofore referred to, deal with administrative and operative problems not involved in this appeal.

(*b*) *Application of the Statute or Nature of the Case.*

The validity of the above statute is questioned as applied to the facts as alleged in the complaint and epitomized by the Supreme Court of the State of Washington in its opinion. 69 Wash. Decisions, No. 3, pages 108, 109; 13 Pac. (2d) 437, 438. (R. 42.)

> "J. T. Roberts * * * brought this action to enjoin the Richland Irrigation District * * * from levying * * * any assessment for the payment of the interest or the principal of the district's bonds (which were issued to pay for district improvements)
>
> > "'* * * against any particular tract of land within said district which will require the payment by the owner of said land of an amount in excess of the special benefit actually accruing to each particular tract of land by reason of the acquiring of water rights and making of improvements by the district, and the issuance of bonds as hereinabove referred to.'
>
> "The interveners (certain owners and holders of bonds issued by the district), who appeared individually and as trustees, and the defendants interposed demurrers, which were sustained. The appeal is from the judgment of dismissal rendered upon the plaintiff's refusal to plead further.
>
> "The allegations of the complaint are, substantially, as follows: Appellant is the owner of forty acres of land in the Richland Irrigation District. That district was legally established

and its organization approved and confirmed judicially in 1919. Thereafter, pursuant to statutory requirements, the district issued bonds in the sum of $538,000, the proceeds from the sale of which were used to purchase additional water rights and to pay the cost of improvements essential to the irrigation of the lands within the district. The bonds bear interest at the rate of six per centum per annum payable semi annually.

"By reason of the improvements made by the district the thirty five irrigable acres of appellant's forty-acre tract were benefited ten dollars an acre; that is, total benefits of three hundred and fifty dollars accrued to appellant's forty-acre tract by reason of the improvements made by the district. The ultimate amount of the liability of the appellant's land for assessments for bond purposes during the ten-year maturing period of the bonds is five hundred and sixty dollars (three hundred and fifty dollars plus interest of six per centum per annum for ten years). For the years 1920 to 1929, inclusive, appellant paid an aggregate of $1,168.65 in assessments against his forty acres for the payment of interest and principal of the bonds described above.

"The directors of the district have made all preparations for, and are threatening to levy for the year 1930 an assessment of $757.53 against the lands of the appellant for the purpose of meeting interest and principal on the bonds. No part of the levy is made on account of, or with reference to, any special benefit accruing to the real property of the appellant. The assessment was levied for the purpose of creating a fund to take up or eliminate the

deficiencies in the bond interest and bond retirement funds.

> "'* * * due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district to such other persons.'

"The directors of the district informed the appellant that it is their fixed policy and that they propose to

> "'* * * assess and re-assess all delinquencies which have heretofore or may hereafter accrue against the lands of this plaintiff and other lands in the district which continue to pay their assessments, without delinquency, until the lands of this plaintiff, and the lands of other persons who have and who shall hereafter pay the assessments levied will create a fund sufficient to pay the entire outstanding indebtedness, and retire said bonds, both principal and interest, and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of this plaintiff and any other landowners in the district who may continue to pay their assessments, but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness. * * *'"

Paragraph VIII of the complaint (R. 4) contains the specific allegation, admitted by the demurrers of the Appellees herein:

> "That no other benefits of any description accrued to this Plaintiff or to the lands owned by him by reason of the acquirement of said additional water rights, the making of said improvements, or the expenditure of any funds by said district in excess of the sum of $350."

The question raised by these admitted facts is:

> Does a State Statute, which, as construed and applied, authorizes the levy, by an irrigation district, of local improvement assessments substantially in excess of and wholly without reference to the benefits accruing to the land so assessed, transgress the due process clause of the Fourteenth Amendment to the Constitution of the United States?

The Supreme Court of the State of Washington has construed the Statute to expressly authorize such an assessment.

State ex rel. Clancy, v. *Columbia Irrigation District of Stevens County*, 121 Wash. 79, 208 Pac. 27;

State ex rel. Wells, v. *Hartung et al.*, 150 Wash. 590, 274 Pac. 181;

Roberts v. *Richland Irrigation District et al.*, *supra* (R. 42).

The sole question for determination, therefore is:

Does a Statute so construed and so applied, contravene the due process clause of the Fourteenth Amendment to the Federal Constitution?

(c) Constitutional Question Timely Raised.

The validity of the above statute was first drawn into question by appropriate allegations in the Complaint, to-wit:

> "* * * That the action of the Board in imposing illegal assessments in the manner hereinabove described, and in threatening to continue to levy all accrued and accruing delinquencies through the successive future years, as herein stated, constitutes a confiscation of the lands of this Plaintiff and the owners of other lands in said district similarly situated, depriving them of their property without compensation and without due process of law, and denying them the equal protection of the law. * * *" (Complaint Par. XVI.) (R. 9.)

The Federal question was thus timely raised in the court below, although, for the purpose of jurisdiction of this Court in this case, it is immaterial whether the question was actually raised since it was expressly decided by the State Court, and was, therefore, "drawn into question."

Mallinckrodt Chemical Works v. *State of Missouri ex rel. Jones*, 238 U. S. 41, 49;
Cissna v. *State of Tennessee*, 246 U. S. 289, 293;
Silver v. *Silver*, 280 U. S. 117, 122;
Home Insurance Company et al. v. *Dick et al.*, 281 U. S. 397, 407.

(d) Constitutional Question Sufficiently Raised.

i. Pleadings and Opinion.

The constitutional question was raised by specific pleading, as set forth in the preceding paragraph (*c*), in that the Appellant alleged that continued application and enforcement of the Statute, in question herein, would deprive him of his property without compensation and without due process of law, and would deny him the equal protection of the law.

Appellant is cognizant of those cases in which this Court indicates that a general reference to a Statute as being unconstitutional and void does not in itself necessarily raise a Federal question, but in such cases the doubt is dispelled if the State Supreme Court in its decision and opinion shows that it understood that the Federal Constitution was the basis for the objection, and sustains the validity of the Statute under the Federal Constitution as well as under the State Constitution:

> *Cissna* v. *State of Tennessee*, 246 U. S. 289, 293;
> *Saltonstall et al.* v. *Saltonstall et al., Trustees*, 276 U. S. 260, 267;
> *New York ex rel. Bryant* v. *Zimmerman et al.*, 278 U. S. 63, 67-69.

The opinion of the Supreme Court of the State of Washington specifically discusses and decides the Federal question.

> "* * * It is insisted that the statute, if it authorize the annual levy of assessments for

> bond purposes in excess of benefits received from such bond issue, is unconstitutional in that the taking of property without due process of law is thereby made possible. * * *" *Roberts* v. *Richland Irrigation District et al., supra,* page 111 in Wash. Dec. and page 438 in 13 Pac. 2 (R. 44).

and also

> "Our Irrigation Statute in no wise offends against the State Constitution *or the United States Constitution.* We have considered all of the authorities cited and deem it unnecessary to review them, as *State ex rel. Wells* v. *Hartung,* 150 Wash. 590, 274 Pac. 181, is determinative of the case at bar" (Italics ours). *Roberts* v. *Richland Irrigation District et al., supra,* page 115 in Wash. Dec. and page 440 in 13 Pac. 2 (R. 47*a*).

ii. Decisions Cited in Opinion of State Supreme Court.

The Supreme Court of the United States will consider the authorities cited in the Opinion of the State Supreme Court in determining whether the latter Court considered the Federal question.

> *New York ex rel. Bryant* v. *Zimmerman et al.,* 278 U. S. 63, 67-69.

State ex rel. Wells v. *Hartung et al.,* 150 Wash. 590, 598, 274 Pac. 181, cited in the State Supreme Court's Opinion herein (*Roberts* v. *Richland Irrigation District et al., supra,* page 115 in Wash. Dec. and page 440 in 12 Pac. 2) (R. 45), upholds the constitutionality of the Statute involved herein upon the authority of

Fallbrook Irrigation District v. *Bradley,* 164 U. S. 112, which deals exclusively with questions arising under the Fourteenth Amendment to the Federal Constitution.

The State Court in its opinion herein (*Roberts* v. *Richland Irrigation District et al., supra,* page 114 in Wash. Dec. and page 440 in 13 Pac. 2) (R. 47) sets forth an extended quotation from *Kadow et al.* v. *Paul et al. Commissioners,* 274 U. S. 175, which case deals exclusively with the Federal Constitutional question in that it specifically discusses the application of the due process clause of the Fourteenth Amendment to the Federal Constitution to a State Statute providing for local improvement assessments in a diking district. *Kadow et al.* v. *Paul et al. Commissioners, supra,* is also cited and discussed in the quotation from *State ex rel. Wells* v. *Hartung et al., supra,* set forth in the opinion of the State Court herein. *Roberts* v. *Richland Irrigation District et al., supra,* pages 113 and 114 in Wash. Dec. and pages 439 and 440 in 13 Pac. 2 (R. 47).

iii. Certificate of the Chief Justice of the Supreme Court of the State of Washington re Consideration of the Federal Question (R. 87).

Appellant is aware of those cases which state that a certificate of the Chief Justice of the State Supreme Court is not adequate in itself to initiate a Federal question, but Appellant submits, herein, the Certificate of the Chief Justice of the Supreme Court of the State of Washington, re Consideration of the Federal

Question, for the purpose of clarifying the references to the Federal Constitution made herein in the opinion of the State Supreme Court and for consideration in connection with the entire record, as authorized by the following decisions:

Dibble v. *Bellingham Bay Land Company*, 163 U. S. 63, 69-70;

Marvin v. *Trout*, 199 U. S. 212, 223;

Rector v. *City Deposit Bank Company*, 200 U. S. 405, 412;

Illinois Central Railroad Company v. *McKendree*, 203 U. S. 514, 524.

iv. Briefs.

The Federal Constitutional question was also presented in the briefs of counsel as the only issue herein:

> "One question only is presented for consideration by the record in this case, to-wit:
>
> "Has an irrigation district the power to levy assessments against the property of an individual landowner in an amount in substantial excess of the total benefits conferred upon his land by the improvement for the cost of which the assessments are levied?
>
> "It is the contention of the appellant that such a levy constitutes a taking of property without due process of law and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States." Appellant's Reply Brief, pages 1 and 2 (R. 133).

Appellant is aware of the cases in which it is suggested that the briefs used in the court below are not

properly a part of the record and are not adequate to initiate a Federal question:

Live Oak Water Users' Association et al. v. *Railroad Commission of California et al.*, 269 U. S. 354, 358;

but assumes it proper to consider them in connection with the whole record, as was done by this Court in *New Work ex rel Bryant* v. *Zimmermann et al.*, 278 U. S. 63, 67-69, when the excerpts of the briefs referred to are properly certified as part of the record from the State Supreme Court.

(5)

Extent of This Court's Jurisdiction.

We have assigned as error the ruling of the court below, to-wit: that the statute, as construed and applied, does not transgress the due process clause of the Fourteenth Amendment to the Federal Constitution.

(*a*) *Application of the Statute Without Due Process of Law.*

This Court has jurisdiction on appeal to determine whether a statute, not invalid on its face, is applied so as to transgress the Federal Constitution.

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112;

Tregea v. *Modesto Irrigation District*, 164 U. S. 179, 181;

Dahnke-Walker Milling Company v. *Bondurant*, 257 U. S. 282, 288;
Fiske v. *Kansas*, 274 U. S. 380, 385.

In the case at bar, the appellant is not contending that the statute may not, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution, create an irrigation district having the power to levy assessments. He does contend, however, that a statute expressly conferring upon such an irrigation district the power to impose aggregate assessments upon real property within its borders *in substantial excess of special benefits conferred on that real property*, contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

Appellant does not question the construction placed upon the statute by the State Supreme Court to the effect that that statute, by its terms, does expressly authorize the imposition by an irrigation district of assessments on land in substantial excess and in total disregard of the benefits conferred on that land. He challenges the constitutionality of a statute so construed and applied as transgressing the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In *Norwood* v. *Baker*, 172 U. S. 269, at pages 278-9, this Court said:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not

> go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. * * *.
>
> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 176, the constitutionality of the Wright Act of California was sustained upon the express assumption

> "* * * assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, * * *"

This statement is in direct conflict with the holding herein of the Supreme Court of the State of Washington.

In the case at bar, it is pleaded and admitted by demurrer that the assessments levied in question are in fact *substantially in excess* of benefits to the land assessed.

In *Kadow et al* v. *Paul et al., Commissioners,* 274 U. S. 175, 181, this Court said:

> "* * * When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Citing cases.) (Italics ours.)

See also:

Hagar v. *Reclamation District No.* 108, 111 U. S. 701, 705;
5 McQuillan on Municipal Corporations, Section 2018, 1913 Edition;
1 Page and Jones on Taxation by Assessment, Section 118, page 197, 1909 Edition.

WHEREFORE, it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

Dated the 15th day of October, 1932.

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